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15 Attorneys for JOSE SUSUMO AZANO MATSURA

16 THE UNITED STATES DISTRICT COURT  
17 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

18 UNITED STATES,  
19 Plaintiff,

20 v.

21 JOSE SUSUMO AZANO  
22 MATSURA,  
23 Defendant.

Case No. 14-cr-0388-MAA  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF MOTIONS:  
(1) TO SUPPRESS FRUITS OF  
ILLEGAL SEARCHES  
(2) AUTHORIZE SUBPOENAS  
Date: October 6, 2015  
Time: 1:30 p.m.

24 **I.**

25 **INTRODUCTION**

26 Mr. Azano moves here to suppress evidence and to authorize a  
27 subpoena. Mr. Azano strongly maintains his innocence and denies any  
28 wrongdoing, but nonetheless moves to suppress based on violations of the

1  
2 Fourth Amendment and the U.S. Code. Furthermore, rather than repeat  
3 factual and legal arguments he raised in his wiretap suppression motions,  
4 he incorporates them here by reference.

5 **A. The Sneak and Peak Warrant**

6 On August 21, 2012, U.S. Magistrate Judge Jan M. Adler issued a  
7 “delayed notice” (“Sneak and Peek”) warrant for 1542 and 1526 Lancaster  
8 Point Way, San Diego, California under 18 USC §§ 3103 and 3103a. A true  
9 and correct copy of the Sneak and Peek warrant and the supporting  
10 affidavit by San Diego Police Officer Michael McEwan are attached to the  
11 Declaration of Knut S. Johnson in Support of Motions: (1) to Suppress  
12 Fruits of Illegal Searches; (2) Authorize Subpoenas<sup>1</sup> (“Johnson Decl.”)

13 Section 3103a(b) provides as follows:

14 With respect to the issuance of any warrant . . . to search for  
15 and seize any property or material that constitutes evidence of  
16 a criminal offense in violation of the laws of the United States,  
17 any notice required, or that may be required, to be given may  
be delayed if—

18 (1) the court finds reasonable cause to believe that providing  
19 immediate notification of the execution of the warrant may  
20 have an adverse result (as defined in section 2705, except if the  
adverse results consist only of unduly delaying a trial);

21 (2) . . . ; and

22 (3) the warrant provides for the giving of such notice within a  
23 reasonable period not to exceed 30 days after the date of its  
24 execution, or on a later date certain if the facts of the case  
justify a longer period of delay.

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25  
26 <sup>1</sup>Filed with this motion but under seal.  
27

1  
2 (c) Extensions of Delay.— Any period of delay authorized by  
3 this section were material and warrant a hearing under *Franks*  
4 *v. Delaware*, 438 U.S. 154, 164 (1978) may be extended by the  
5 court for good cause shown, subject to the condition that  
6 extensions should only be granted upon an updated showing  
7 of the need for further delay and that each additional delay  
8 should be limited to periods of 90 days or less, unless the facts  
9 of the case justify a longer period of delay.

10 The “adverse results” required before a court may grant a delayed  
11 notification warrant under § 2705(2) are as follows:

- 12 (A) endangering the life or physical safety of an individual;  
13 (B) flight from prosecution;  
14 (C) destruction of or tampering with evidence;  
15 (D) intimidation of potential witnesses; or  
16 (E) otherwise seriously jeopardizing an investigation or unduly  
17 delaying a trial.

18 The United States received six extensions of time to delay the notice  
19 required, the first five based on affidavits by Officer McEwan and the last  
20 based on an affidavit by FBI Special Agent Erin Phan.

21 **B. The Warrant For Mr. Azano’s Homes**

22 On January 21, 2014, U.S. Magistrate Judge Barbara Major issued  
23 search warrants for residences owned by Mr. Azano at 1 Buccaneer Way  
24 and 8 Green Turtle Way, Coronado, California. Both of those warrants  
25 were based on the same affidavit signed by FBI Special Agent Erin Phan,  
26 which is attached to the Johnson Decl. as Exhibit B.

27 The "bulwark of Fourth Amendment protection, of course is the  
28 Warrant Clause, requiring that, absent certain exceptions, police must  
obtain a warrant from a neutral and disinterested magistrate before

1  
2 embarking on a search." *Franks v. Delaware*, 438 U.S. 154, 164 (1978). It  
3 is also fundamental that "the Fourth Amendment protects a person's  
4 private conversations as well as his private premises." *Alderman v. United*  
5 *States*, 394 U.S. 165, 178 (1968).

## 6 II.

### 7 THE SNEAK AND PEEK WARRANT

8 After beginning this investigation with the mysterious and perhaps  
9 non-existent email chain, the government sought to secretly enter Mr.  
10 Azano's offices to review documents. The court gave the government  
11 permission, and then allowed the government to keep that search secret.

#### 12 A. The Affidavit Fails to Establish Probable Cause and 13 Misstatements and Omissions Warrant a Franks Hearing

14 The affidavit in support of the Sneak and Peek warrant tries the  
15 shotgun approach to try to establish probable cause: raise as many  
16 allegations as possible using guessing, false statements, inaccurate  
17 statements of law, hyperbole, and nonsense and maybe something will  
18 stick.

19 The affidavit first tries to allege "false statements on a tax return and  
20 tax evasion." Exhibit A, ¶¶7-14. These allegations may be summarized as  
21 follows: Mr. Azano spent a lot of money and did not pay taxes.

#### 22 1. Tax Allegations

23 First, the affidavit refers to Azano's entities as "corporations,"  
24 despite the fact that they are Limited Liability Companies. This mistake is  
25 made numerous times throughout the affidavit and is extremely  
26 misleading.

1  
2 Corporations are separate tax paying entities that are required to file  
3 tax returns (Form 1120) and pay tax on any taxable income reported. The  
4 entities Mr. Azano is accused of evading taxes with are limited liability  
5 companies (LLCs), which do not pay taxes. LLCs may elect to be taxed as  
6 corporations, but the three entities in question did not make an election to  
7 be taxed as corporations.

8 In this situation (i.e., no election to be taxed as a corporation), LLCs  
9 with two or more members are taxed as a partnership (Form 1065) and  
10 LLCs with only a single member will be treated as a sole proprietorship.  
11 According to Chief Counsel Advice 200235023: "If the single member  
12 owner has not elected to be treated as.....a corporation, the default  
13 provision of the check-the-box regulations provides that the LLC is to be  
14 disregarded. In other words, the single member owner is the taxpayer."

15 Airsam N492RM, LLC ("Airsam LLC") is described in the complaint  
16 as a sole member LLC, with Azano being the only member. As a result,  
17 the IRS should disregard the existence of the Airsam LLC. When the  
18 affidavit refers to "Airsam's tax liability," the affiant misled the court  
19 because Airsam LLC was not responsible for paying any taxes. The  
20 affidavit refers to a Form 1065 that was filed by Airsam LLC, but Airsam  
21 LLC was not required file one because a one-member LLC should not file a  
22 Form 1065. A taxpayer does not commit tax fraud on a return that is not  
23 required to be filed and for an entity that does not pay tax.

24 The affidavit also indicates that the deposits and withdrawals for  
25 Airsam LLC do not match up with the gross receipts and expenses on the  
26 Form 1065. This is not unusual. Deposits are not always taxable income  
27 and come from a number of sources. The deposits might be loans from the

1  
2 shareholder and/or contributions to capital. Likewise, withdrawals are not  
3 always equal to expenses reported on the tax return. The member of the  
4 LLC might pay for expenses of the LLC outside of the entity and get  
5 reimbursed for the expenses later.

6       There is also the question of whether the entity in question carried  
7 on a legitimate business. An LLC may be set up to hold Mr. Azano's  
8 personal aircraft for personal use. Mr. Azano might have been motivated  
9 to hold the aircraft in a LLC to limit his liability. The deposits and  
10 withdrawals might not even be related to a business. The affidavit  
11 conveniently ignored these facts.

12       Also, Beverly Hills Financial Services, LLC ("Beverly Hills LLC") has  
13 two members, according to the affidavit, so is required to file a partnership  
14 return (Form 1065). However, partnerships are not tax-paying entities,  
15 and the income flows through to each partners' tax return. If the partner  
16 in question does not owe taxes, no Form 1040 will get filed. This is  
17 particularly true with foreign partners. The affidavit says that Beverly  
18 Hills LLC "does not have a unified business purpose." Beverly Hills LLC,  
19 much like Airsam LLC, could have been set up for personal purposes (a  
20 fact conveniently ignored by the affidavit). In that case, the deposits and  
21 withdrawals are not be business related. Once again, the deposits and  
22 withdrawals of Beverly Hills LLC might not match up with the gross  
23 receipts and expenses shown on the LLC's partnership return. This is very  
24 common and to be expected. Many of the deposits might be loans from  
25 the members and/or contributions to capital, neither of which is taxable  
26 income. Expenses and withdrawals, likewise, are not likely to match up  
27 for a number of reasons. The members of the LLC might be paying for the

1  
2 entities expenses and will be reimbursed by the entity at a later date.  
3 Thus, this part of the affidavit fails to establish probable cause and the  
4 factual misstatements and omissions to this section were material and  
5 warrant a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

## 6                   **2. Campaign Finance Fraud Allegations**

7           The Sneak and Peek affidavit also tries to establish probable cause  
8 that campaign finance crimes have occurred. Exhibit A, ¶¶ 15-19. To do  
9 so, the affidavit first claims that a witness told agents that Mr. Azano gave  
10 \$1,000.00 to a third person, who then gave it to the witness to reimburse  
11 the witness for a political contribution. If true, this conduct would amount  
12 to a misdemeanor. *See*, 2 U.S.C. § 437g. However, the witness could not  
13 find a copy of the check he claimed to have written to the campaign, and  
14 “publicly available campaign disclosures” did “not appear to show any  
15 such donation.” In other words, a witness claimed that Mr. Azano  
16 committed a misdemeanor but the public record seemed to showed no  
17 such crime occurred.

18           The affidavit then claims that a PAC, San Diegans for Bonnie  
19 Dumanis for Mayor 2012, Sponsored by Airsam N492RM, LLC, made  
20 independent expenditures in favor of a candidate. The affidavit claims  
21 that because “of the similarity in their names,” Mr. Azano’s LLC must be  
22 involved. The affiant then goes further, and states that “[a]ccording to a  
23 news story” “the PAC is controlled” by Mr. Azano. The affiant never  
24 explains how Mr. Azano “controlled” the PAC, and utterly ignored the  
25 public filings that showed he did not. *See*, Johnson Decl., Exhibits D and E.



1  
2 The affidavit also failed to disclose that the Federal Election  
3 Commission ("FEC") issued an Advisory Opinion (Advisory Opinion  
4 2000-17 (the "FEC Opn."), stating that a foreign owned corporation may  
5 donate to a PAC: "a corporation organized under the laws of any State  
6 within the United States that has its principal place of business in the  
7 United States is not a foreign principal. Therefore, it follows that such a  
8 corporation would not be a foreign national under 2 U.S.C. § 441e." The  
9 affidavit never explains that a donation from such a company to a PAC  
10 was illegal (probably because it is not).

11 In other words, the affidavit shows no evidence of campaign finance  
12 crimes, misstates the evidence, misstates the law, and these factual  
13 misstatements and omissions to this section were material and warrant a  
14 hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

### 15 3. Allegations of Attempts to Influence Officials

16 In a fantastic leap of logic, the affidavit claims that because Ernie  
17 Encinas tried to hire a detective from the San Diego Police Department,  
18 Mr. Azano must be doing something (the affidavit is unclear what) he  
19 should not be doing. Again, the affidavit's fanciful logic fails to establish  
20 probable cause, and the factual misstatements and omissions to this  
21 section were material and warrant a hearing under *Franks v. Delaware*, 438  
22 U.S. 154 (1978).

### 23 4. Structuring Deposits

24 Agents copied a ledger belonging to a "secretary for Azano's  
25 accounting office . . ." Her ledger indicated deposits of \$2,000 to \$9,000  
26  
27  
28



1  
2 every two to ten days. The affidavit does not state whether the deposits  
3 were by check or cash.

4 In June 2012, agents claim that they saw the secretary receive  
5 “envelopes.” They claim she “moved her hand as if counting money.”  
6 She then drove to a bank. Some time that day, according to a bank  
7 employee, the secretary deposited \$9,6000 into one account and \$1,700 in  
8 another. That secretary had three accounts in the bank, and Mr. Azano  
9 had ten.

10 Again, the affidavit’s fanciful logic fails to establish probable cause,  
11 and the factual misstatements and omissions to this section were material  
12 and warrant a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

13 5. **Conspiracy to Obstruct the Federal Aviation Authority**  
14 **(“FAA”)**

15 In paragraphs 27 to 35 the affidavit claims that as a non-citizen, Mr.  
16 Azano “cannot own an aircraft registered in the United States (sometimes  
17 called an ‘N-registered’ aircraft).” ¶ 28. The affidavit then goes on to note  
18 that Mr. Azano has several airplanes with a “connection” to him that have  
19 an N-registration and which are owned by a trust. The affidavit then  
20 argues that Mr. Azano owned aircraft in trusts to disguise his “illegal  
21 ownership.”

22 However, the affidavit complete ignores the long history of the FAA  
23 specifically allowing non-citizens to register aircraft as part of a trust. *See*,  
24 14 C.F.R. § 47.7; FAA Notice of Policy Clarification for the Registration of  
25 Aircraft to U.S. Citizen Trustees in Situations Involving Non-Citizen  
26 Trustors and Beneficiaries, Docket FAA-201100012 (a trued and correct  
27 copy of which is attached to Johnson Decl. as Ex. F). The affidavit never  
28

1  
2 sets forth any facts to show that any aircraft with a “connection” to Mr.  
3 Azano was registered in violation of any FAA regulations, and the factual  
4 misstatements and omissions to this section were material and warrant a  
5 hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

6                   **6.     Extortion of Semptra**

7           The affidavit repeats the often stated, but baseless allegation based  
8 *exclusively* on Semptra’s allegations that, during the course of the ongoing  
9 litigation, “[a] group of individuals in Mexico and the United States have  
10 engaged in extortionate threats [against Semptra].”<sup>2</sup> ¶¶ 36-50. On October  
11 13, 2013, Judge Bencivengo dismissed those claims in case number 10-cv-  
12 1513-CAB.

13           The government’s “proof” of that claim rested only the assertion that  
14 “[a]gents of Semptra are in the possession of an email chain in which  
15 Azano participated.” The U.S. Attorney does not have possession of that  
16 email chain.<sup>3</sup> Semptra and Jones Day have resisted subpoenas for that  
17 chain (and other materials) and Mr. Azano brings a motion filed herewith  
18 to enforce those subpoenas.

19           These allegations in the affidavit in no way establish probable cause  
20 that Mr. Azano was engaged in any crime, and the factual misstatements  
21

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22           <sup>2</sup> EM\_PLDGS\_00000298.

23           <sup>3</sup> See, Sept. 22, 2014 letter from Acting U.S. Attorney William Cole to  
24 Knut S. Johnson, previously provided to this Court. Counsel has  
25 attempted obtaining that email chain from both Semptra and Jones Day,  
26 but both are resisting the subpoena for the email chain the government  
27 claims they have.

1  
2 and omissions to this section were material and warrant a hearing under  
3 *Franks v. Delaware*, 438 U.S. 154 (1978).

4 B. ***The Request For Delayed Notice Was Without Merit and Based***  
5 ***on Material Misstatements and Omissions***

6 The affidavit makes wild and unsubstantiated claims that immediate  
7 notification of the warrant may “threaten the life and physical safety of”  
8 persons. ¶¶ 57-58. The affidavit also alleges that immediate notification  
9 might cause Mr. Azano “to flee the United States” (¶ 61), destroy evidence  
10 and intimidate witnesses (¶ 62), and “threaten the investigation” (¶ 63).

11 All of the allegations for delayed notice are based on the worst kind  
12 of speculation with no facts to back them up. There is no evidence  
13 presented (because none exists) that Mr. Azano is a threat to anyone, or  
14 that he has ever tried to flee the United States (where his U.S. citizen wife  
15 and children live and where he owns real and personal property worth tens  
16 of millions of dollars). There is no evidence he ever attempted to destroy  
17 evidence, intimidate witnesses, or do anything warranting delayed  
18 notification.

19 Sections 3103 and 3103a provide for delayed notice of a search only if  
20 there is “reasonable cause to believe that immediate notification of the  
21 execution of the warrant may have an adverse result (as defined in section  
22 2705<sup>4</sup> . . .).” As noted above, there was no such “reasonable cause for the  
23

24  
25 <sup>4</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968  
26 (18 U.S.C. § 2510 *et seq.*) is meant to protect the privacy of both wire and  
27 oral communications and to regulate “the use of electronic surveillance  
28

(Footnote cont'd on next page)

1  
2 initial delay order or any of the subsequent extensions. *See*, Ex.s G-L.  
3 Because there was no reason to delay notification—much less to extend  
4 notification—this Court should suppress and/or hold a *Franks* hearing. *See*,  
5 *e.g.*, *United States v. Villegas*, 899 F.2d 1324, 1337 (2nd Cir 1990); *United States*  
6 *v. Freitas*, 800 F. 2d 1451 (9th Cir. 1986); *United States v. Johns*, 851 F.2d 1131  
7 (9th Cir. 1988).

### 8 **III.**

#### 9 **THE WARRANT TO SEARCH MR. AZANO'S HOMES**

10 The 104-page affidavit in support of the warrants to search Mr.  
11 Azano's homes (the Home Affidavit) is attached to the Johnson Decl. as Ex.  
12 B.

##### 13 **A. The Affidavit Failed to Establish Probable Cause**

14 The affidavit to search Mr. Azano's homes reached back to rely upon  
15 other searches that were without probable cause.

##### 16 **1. The Sneak and Peek Warrant**

17 The Home Affidavit relies upon evidence seized using the Sneak and  
18 Peek warrant, which as noted above was without probable case. *See*, ¶¶ 6,  
19 34-55; 118-120

##### 20 **2. The Title III Intercept**

21 The Home Affidavit also relies upon evidence seized using wiretaps.  
22 ¶ 8-9, 96-99. Mr. Azano previously moved to suppress this wiretap  
23 evidence, but this Court declined to rule on probable cause (or the request

24 \_\_\_\_\_  
(Footnote cont'd from previous page.)

25  
26 evidence obtained by law enforcement under specified conditions."  
27 *Bartnicki v. Vopper*, 532 U.S. 514, 523 (2001).

1  
2 for a *Franks* hearing), holding that Mr. Azano lacked standing (in part) and  
3 otherwise finding the motion moot. [Dkt. 188.] Mr. Azano incorporates by  
4 reference his previously filed arguments regarding the wiretaps, and  
5 argues here that he has standing and the issue is not moot because the  
6 government used the illegally intercepted conversations to justify a search  
7 of Mr. Azano's homes.

### 8                   3.     The IRS Conspiracy

9           Mr. Azano here incorporates his earlier argument regarding the  
10 alleged IRS conspiracy. He again asks for a *Franks* hearing and asserts that  
11 this section fails to establish probable cause.

### 12                   4.     Campaign Finance

13           Mr. Azano here incorporates his earlier arguments in this pleading  
14 and his arguments for his motion to suppress wiretap intercepts regarding  
15 campaign finance. In addition, the affidavit misleads when it states that  
16 Mr. Azano "never again created his own political action committee." ¶ 70.  
17 That statement is false in that he never before or after created a PAC.

18           Further, the affidavit contains evidence that Mr. Azano is *innocent*  
19 because he never knew that he could not donate: In Spring 2013 (long after  
20 the events in the indictment but well before even Encinas knew about the  
21 investigation) Mr. Azano wrote a personal check for a candidate with his  
22 name and address on the check, showing a total lack of intent to hide his  
23 donation. See, e.g. ¶ 112 and EM-PHYSICAL EV\_00000027. This Court  
24 should conduct a *Franks* hearing and/or find a lack of probable cause.

25     ///

26     ///

1  
2 **IV.**

3 **THIS COURT SHOULD ORDER THE SUBPOENA ISSUED**

4 Attached to the Johnson Decl. as Ex. C is the order of the Magistrate  
5 quashing the subpoena to Jones Day and Sempra for the missing email  
6 chain. After Mr. Azano moved this Court for an order the government  
7 produce the missing email chain, this Court heard argument about the  
8 email on August 25, 2014. At that hearing, the Court stated as follows:  
9 “Can you at least go back and figure out how you got it and tell him how  
10 you got it?” Transcript, 27: 4-5. In response, the government sent counsel  
11 for Mr. Azano a letter stating:

12 The government does not possess the email chain referenced in  
13 . . . of the pen register application in 11mc0853. Rather, as  
14 stated in the pen register application, the email chain was in  
15 possession of SEMPRA. Former Assistant United States  
16 Attorney Tim Perry’s best recollection is the SEMPRA  
17 representative Robert Brewer and/or Kimberly McDonnell  
18 showed and/or described the email chain to the government.

19 The government used the allegations about the missing email chain  
20 as follows:

21

22

23

24

25

26

27

<u>Date</u>	<u>Government Application</u>	<u>Discovery</u> <u>(EM PLDGS ...)</u>	<u>Case</u> <u>Number</u>
7/1/11	Under Seal Application for Order Authorizing Disclosure of Subscriber and Other Information	00000295	11 MC 853
7/25/11	Under Seal Application for Order Authorizing Disclosure of Subscriber and Other Information	00000303	11 MC 957
8/4/11	Under Seal Application for Order Authorizing Disclosure of Subscriber and Other Information	0000313	11 MC 1014

6/20/12	Pen Register	00000001	Unint.
6/20/12	Under Seal Application for Order Authorizing Disclosure of Subscriber and Other Information	00000323	Unint.
7/30/12	Pen Register	00000015	Unint.
8/20/12	Pen Register	00000031	Unint.
12/28/12	Under Seal Application for Order Authorizing Disclosure of Subscriber and Other Information	00000336	12 MC 1703

The order quashing the subpoena for the missing email chain notes, "If Judge Anello determines that any document identified in either subpoena is relevant to a motion to suppress, Defendant Azano may reapply to this Court for enforcement (or re-issuance) of the subpoena." Ex. C, page 11: 14-17. The government cited the missing email chain repeatedly in their applications for information, all of which were relied upon in the warrants for Mr. Azano's homes. Thus, the email chain (or lack thereof) is relevant to the now pending motions to suppress and any *Franks* issues related thereto. This Court should order the issuance of subpoenas to Jones Day and Sempra for the missing email chain.

## V.

### CONCLUSION

For the foregoing reasons, this Court should grant the above motions.

Dated: March 21, 2014

Respectfully submitted,

/s/ Knut S. Johnson

**Knut S. Johnson, Esq. for**

Jose Susumo Azano Matsura